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No. 96-506

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

MICHAEL DUTTON,

Petitioner,

v.

KENNETH WAYNE O'GUINN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO PROCEED *IN FORMA PAUPERIS*

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18 pp

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Pursuant to Rule 39.1, Rules of the Supreme Court of the United States, petitioner Kenneth Wayne O'Guinn respectfully requests that this Court grant him leave to proceed *in forma pauperis*. In support thereof, Mr. O'Guinn shows:

1. Pursuant to 21 U.S.C. § 848(q), the United States District Court for the Middle District of Tennessee appointed Mr. O'Guinn undersigned counsel to represent him in a capital habeas corpus proceeding.

2. The District Court and the United States Court of Appeals for the Sixth Circuit allowed Mr. O'Guinn to proceed *in forma pauperis*.

3. While the District Court issued a conditional writ of habeas corpus, the en banc Sixth Circuit dismissed Mr. O'Guinn's habeas corpus proceeding for failure to exhaust state remedies.

4. Warden Dutton has filed a Petition For Writ of Certiorari to the Sixth Circuit, and Mr. O'Guinn desires to file a) a Brief in Opposition to that petition; and b) a Conditional Cross-Petition For Writ of Certiorari.

WHEREFORE, Mr. O'Guinn respectfully requests that this Court grant him leave to proceed *in forma pauperis*.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing to Michael Moore, Solicitor General, State of Tennessee, 500 Charlotte Avenue, Nashville, Tennessee 37243, this 23RD day of October, 1996.

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Christopher M. Minton

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit possessed discretion to require exhaustion of state remedies despite Warden Dutton's express waiver of the exhaustion requirement

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STATEMENT OF THE CASE

On October 12, 1990, Kenneth Wayne O'Guinn filed in the United States District Court for the Middle District of Tennessee a habeas corpus petition challenging the constitutional validity of his convictions for the rape and murder of Sheila Marie Cupples and his resulting life and death sentences.

In January 1991, pursuant to Tennessee's Public Records Act (TPRA), T.C.A. § 10-7-503(a) et seq., Mr. O'Guinn filed in State court an action seeking access to documents the State created in investigating Sheila Cupples's rape and murder. On January 29, 1992, the Tennessee Court of Appeals affirmed the trial court's conclusion that pursuant to the TPRA, 1) Mr. O'Guinn had the right to inspect and copy documents in the possession of the local police and district attorney; but 2) he did not have the right to inspect and copy Tennessee Bureau of Identification (TBI) documents.

On May 15, 1992, pursuant to Rule 6 of the Rules Governing Section 2254 Cases, United States District Judge L. Clure Morton ordered that the State provide Mr. O'Guinn the opportunity to inspect and copy the TBI documents. Upon doing so, Mr. O'Guinn learned for the first time that prior to his trial, the State withheld, among other evidence, *sworn statements* that 1) one week before the murder, Joanie Cupples, Sheila's cousin, assaulted Sheila with a knife and declared, "I'll kill you"; 2) the night of the murder, witnesses saw persons other than Mr. O'Guinn kidnapping Sheila from a bar; 3) hours prior to the official discovery of Sheila's body, a man other than Mr. O'Guinn stated

that a girl had been murdered, and that man sought to establish an alibi for the hours in which Sheila's murder occurred; and 4) four months after the murder, Joanie Cupples confessed that she and others kidnapped Sheila from a bar and took her to a motel room from where Sheila was not allowed to leave. Mr. O'Guinn immediately amended his habeas petition to include a claim that at his trial, the State violated the Fourteenth Amendment by withholding exculpatory, material evidence (Brady claim).

On March 31, 1993, Judge Morton issued a conditional writ of habeas corpus. He held that the State unconstitutionally obtained the only evidence suggesting that Mr. O'Guinn was guilty of Sheila's rape and murder, uncounseled statements Mr. O'Guinn gave after repeated custodial interrogation sessions occurring over a forty-day period. O'Guinn v. Dutton, 870 F.Supp. 779, 781-84 (M.D. Tenn. 1993). As to Mr. O'Guinn's Brady claim, Judge Morton did not address it. Id., 870 F.Supp. at 786.

On appeal to a three-judge Sixth Circuit panel, Mr. O'Guinn acknowledged that his Brady claim was unexhausted, and he therefore presented the Sixth Circuit with a "mixed petition." Given that Warden Dutton expressly waived his right to insist that Mr. O'Guinn exhaust his Brady claim, Mr. O'Guinn requested that the panel affirm the relief to which he is plainly entitled. See Mr. O'Guinn's Cross-Petition For Writ Of Certiorari.

On December 8, 1994, the panel filed its opinions. In an opinion written by Judge Batchelder, a two-judge majority held that although Mr. O'Guinn's Brady claim rendered his petition

mixed, under Granberry v. Greer, 481 U.S. 129 (1987), the interests of justice and comity permitted the panel to deny Mr. O'Guinn relief on the merits of his claims. As to Mr. O'Guinn's Brady claim, the majority's consideration of it amounted to two sentences devoid of analysis and citation to authority.[1]

The Sixth Circuit granted Mr. O'Guinn's petition for en banc rehearing, and the panel withdrew its opinion.

The panel had divided on the question of whether Mr. O'Guinn should be required to exhaust his Brady claim in state court, and it was uncertain whether the en banc court would require exhaustion. To preserve his ability to exhaust his Brady claim, on April 18, 1995, Mr. O'Guinn initiated a state post-conviction proceeding.[2] Mr. O'Guinn alleged, among other things, that because the State withheld exculpatory, material evidence, his convictions and sentences violate the Fourteenth Amendment and Article I, § 8 of the Tennessee Constitution. The trial court dismissed Mr. O'Guinn's petition, and Mr. O'Guinn timely filed a notice of appeal. On November 2, 1995, the Tennessee Court of

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[1] O'Guinn v. Dutton, at pages 176a-77a of Warden Dutton's 9/30/96 Petition For Writ Of Certiorari.

[2] As of April 1995, the Tennessee Post-Conviction Procedures Act contained a statute of limitations that ran three years after the conclusion of the petitioner's direct appeal. T.C.A. § 40-30-102 (repealed). When a petitioner did not have the opportunity to present a claim for relief in that time period, however, he had three years from the date that the claim came to light to present it. Burford v. State, 845 S.W.2d 204, 208-10 (Tenn. 1992). Given that Mr. O'Guinn could not have unearthed the factual basis for his Brady claim until Judge Morton's May 15, 1992, order, Mr. O'Guinn had until May 15, 1995, to invoke Tennessee's Post-Conviction Procedures Act for that claim. See id., 845 S.W.2d at 211 (Daughtery, J., concurring).

Criminal Appeals stayed its consideration of Mr. O'Guinn's appeal pending final disposition of the appeal pending before the en banc Sixth Circuit.

Proceeding before the en banc Sixth Circuit, Warden Dutton again expressly waived his right to insist that Mr. O'Guinn exhaust his Brady claim. Given this waiver, Mr. O'Guinn again requested that the court affirm the relief to which he is plainly entitled.

On July 3, 1996, the Sixth Circuit filed its opinion dismissing Mr. O'Guinn's petition as a mixed petition. The Court reasoned that Mr. O'Guinn's unexhausted Brady claim presented a "serious" constitutional issue, that claim was pending in state court, and there was no reason to believe that the state courts will not address that claim. O'Guinn v. Dutton, 88 F.3d 1409, 1412-13 (6th Cir. 1996)(en banc).[3]

Upon the issuing of the Sixth Circuit's mandate, Tennessee's Court of Criminal Appeals lifted its stay and established a briefing schedule. On August 19, 1996, Mr. O'Guinn filed his brief with that court. The State thereafter requested that the Court of Criminal Appeals stay its consideration of Mr. O'Guinn's appeal pending disposition of a certiorari petition Warden Dutton

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[3] Warden Dutton grouses that fifteen years after the crime, final resolution of this case will be delayed further while the state courts consider Mr. O'Guinn's Brady claim. This delay results, however, not from any conduct on Mr. O'Guinn's part, but from the State's refusal to provide Mr. O'Guinn exculpatory evidence until ordered by a federal judge to do so. It ill serves Warden Dutton to complain about a delay that results from the State's own conduct.

intended to file in this Court. The Court of Criminal Appeals denied the State's motion and ordered that it file a brief.

REASONS TO DENY WARDEN DUTTON'S PETITION FOR WRIT OF CERTIORARI

Granberry and its progeny belie Warden Dutton's assertion that this Court must provide "an authoritative clarification of the proper role of a state's express waiver of a meritorious exhaustion defense." Federal courts uniformly hold that they have discretion to accept or reject a state's express waiver of the exhaustion requirement, and they do not engage in conflicting analyses respecting the effect of such a waiver.

I

Granberry states that

> there are exceptional cases in which the State fails, whether inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense. The State's omission in such a case makes it appropriate for the court of appeals to take a fresh look at the issue. The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim.

Granberry, 481 U.S. at 134 (emphasis added). Circuit courts uniformly interpret this statement as providing them discretion to accept or reject a state's express waiver of the exhaustion requirement. See Parron v. Quick, 869 F.2d 87, 89 (2nd Cir. 1989); Davis v. Lansing, 851 F.2d 72, 76 (2nd Cir. 1988); Plunkett v. Johnson, 828 F.2d 954, 956 (2nd Cir. 1987); Brown v. Fauver, 819 F.2d 395, 398 (3rd Cir. 1987); Graham v. Johnson, 94

F.3d 958, 970-71 (5th Cir. 1996); Dupuy v. Butler, 837 F.2d 699, 701-02 (5th Cir. 1988); Weaver v. Foltz, 888 F.2d 1097, 1100 (6th Cir. 1989); Prather v. Rees, 822 F.2d 1418, 1422 (6th Cir. 1987); Mikel v. Thieret, 887 F.2d 733, 736-37 (7th Cir. 1989); Hickey v. Duffy, 827 F.2d 234, 243 (7th Cir. 1987); Hampton v. Miller, 927 F.2d 429, 431 (8th Cir. 1991); White v. Lewis, 874 F.2d 599, 602 (9th Cir. 1989); Esslinger v. Davis, 44 F.3d 1515, 1524-25 & n.32 (11th Cir. 1995).

Federal courts recognize that notions of federalism and comity underlie the exhaustion requirement, and these notions are a two-way street. As the Eleventh Circuit explains in a pre-Granberry case:

> Strong federal interests may exist that, balanced against those of the state in a particular case, will permit [a federal court] in its discretion to decline a waiver and require state exhaustion. An unconditional right of waiver would increase the burden on the federal system. In a particular case, fact finding on the issues with respect to which waiver is asserted may be done best in state court. The complete factual record will aid the federal court in its review. [citation omitted] When state courts initially address requests for collateral relief some cases will never reach the federal courts, for the state courts will recognize constitutional violations and grant relief. Other cases will be abandoned or mooted. Moreover, while Sec. 2254 reflects deference to state fact finding, the exhaustion requirement increases state courts' familiarity with and hospitality to federal constitutional claims.

Thompson v. Wainwright, 714 F.2d 1495, 1509 (11th Cir. 1983); see also McGee v. Estelle, 722 F.2d 1206, 1214 (5th Cir. 1984)(en banc). Post-Granberry cases confirm this reasoning. See Graham v. Johnson, 94 F.3d at 970; Hines v. U.S., 971 F.2d 506, 508-09 (10th Cir. 1992); Brown v. Fauver, 819 F.2d at 398.

Federal courts agree that they possess discretion to accept or reject a state's express waiver of the exhaustion requirement. As the next section demonstrates, they do not engage in conflicting analyses when presented with such a waiver.

II

Where a state does not assert the exhaustion requirement, in determining whether to address the merits of a case containing an unexhausted claim or to dismiss the case for failure to exhaust, courts consider which approach better serves comity and federalism. Granberry instructs that in making this determination, courts consider 1) whether the unexhausted claim is patently frivolous or plainly warrants relief; 2) whether the case presents an unresolved issue of state law; and 3) whether the case presents an unresolved issue of fact. Granberry, 481 U.S. at 134-36.

Circuit courts consider a state's express waiver of the exhaustion requirement relevant to determining whether entertaining unexhausted claims will offend state comity interests. Given that, as discussed above, comity is a two-way street, however, federal courts uniformly go on to consider other factors Granberry sets outs when presented with a state's express waiver. After doing so, they then exercise their discretion to either accept or reject the state's express waiver. See Graham v. Johnson, 94 F.3d at 970-71; Esslinger v. Davis, 44 F.3d at 1524 n.34; Hampton v. Miller, 927 F.2d at 431; Dupuy v. Butler, 837 F.2d at 702; Prather v. Rees, 822 F.2d at 1422.

Warden Dutton fails to demonstrate a conflict respecting the effect under Granberry that circuit courts give a state's express waiver of the exhaustion requirement. He cites four cases, two of which were decide before Granberry and therefore have no bearing on whether the circuits apply or interpret Granberry differently when presented with an express waiver. Petition For Writ of Certiorari at 13. As to the two post-Granberry cases Warden Dutton cites, they confirm that when presented with a state's express waiver of the exhaustion requirement, circuit courts go on to consider factors Granberry lists. See Graham v. Johnson, 94 F.3d at 970-71 (Fifth Circuit exercises its discretion to reject the state's express waiver of the exhaustion requirement because the case involves unresolved factual issues); Hampton v. Miller, 927 F.2d at 431 (Eighth Circuit exercises its discretion to accept the state's express waiver of the exhaustion requirement where the state supreme court previously demonstrated that issue raised is not of importance to it).

CONCLUSION

Federal courts uniformly recognize that Granberry provides them discretion to accept or reject a state's express waiver of the exhaustion requirement. Court engage in consistent analyses in determining how to exercise the discretion Granberry provides when presented with an express waiver. This Court should therefore deny Warden Dutton's Petition For Writ Of Certiorari.

Respectfully submitted,
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